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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1275

NATURAL GAS PIPELINE COMPANY OF AMERICA,
Petitioner,

vs.

TRANSCONTINENTAL GAS PIPELINE CORPORATION, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION OF THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

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QUESTION PRESENTED

Whether the Court of Appeals correctly reversed a Commission decision permitting producers of natural gas to abandon service to one pipeline so that they could sell their gas to another, which failed to consider the comparative needs of the two pipelines for such service or the Examiner's findings that the existing pipeline had a greater need for the gas.

STATUTE INVOLVED

Section 7(b) of the Natural Gas Act, 52 Stat. 834, 15 U.S.C. § 717f(b), establishing the procedural and substantive prerequisites to any abandonment of natural gas service, is set out at page 2 of the Petition.

STATEMENT

The petition in this case seeks review of an opinion of the Court of Appeals for the District of Columbia Circuit reversing a decision of the Federal Power Commission which authorized a number of producers of natural gas to abandon service to Transcontinental Gas Pipe Line Corporation (Transco) in order to serve petitioner, Natural Gas Pipeline of America (Natural). The primary basis for the Court determination was that, in concluding that public convenience or necessity permitted the abandonment of service to Transco within the standards established by Section 7(b) of the Natural Gas Act, the Commission had improperly failed to consider the comparative needs of the two pipelines and their customers for continuing service.

The Public Service Commission of the State of New York (New York) is a regulatory body duly established by the laws of the State of New York having cognizance over the operations of the gas distribution companies doing business in the State. As such it is vitally interested in proceedings of the Federal Power Commission relating to the gas supplies of pipelines serving New York customers, one of which is Transco. Accordingly, New York intervened in the Commission proceeding on the applications seeking abandonment of existing service to Transco, and participated actively both at the Commission and in the lower court in opposition to any such abandonment. The proposed abandonment was of particular concern to New York since Transco is already curtailing firm service

to its customers, including those in New York State, and grant of the abandonment authorized here would have reduced Transco gas supply by an additional 81,000 Mcf per day.

The present proceeding has a rather long administrative history. In 1947, contracts were entered into by the producers in the La Gloria field of Texas and Transco which, as amended in 1949 prior to initial delivery, provided for the sale of 81,000 Mcf per day of gas to Transco over a period of 20 years at prices specified in the contract. (R. 3446-3483)[1] Any surplus gas in addition to this amount was to be available for sale to other parties, and on January 25, 1950 the producers entered into a contract with Natural to sell it up to 85,000 Mcf per day, subject to the producer's prior obligation to Transco and to their right to use gas for their own purposes in the field. (R 1301-1392)

A dispute subsequently ensued between the producers and Natural as to the amount of gas to which Natural was entitled. When this Court in *Phillips Petroleum Co.* v. *Wisconsin*, 347 U.S. 672, concluded that the producers sales were subject to Commission regulation under the Natural Gas Act, the dispute was brought to the Commission with the producers attempting to invoke a clause in their contract with Natural which permitted them to terminate service if it became subject to the Federal Power Commission's jurisdiction, and Natural opposing such action and arguing that the producers were not delivering all of the gas due it under the contract. In *Argo Oil Corp.*, 15 F.P.C. 601, 622 (1956), the Commission decided that the producers could not terminate the contract with Natural without first invoking the abandon-

[1] Citations in this opposition to R. —— are to the original record before the Commission; to J.A. —— to the printed Joint Appendix, copies of which have been lodged with the Court; and to Pet. A —— to the Appendix to the petition.

ment provisions of Section 7(b) of the Natural Gas Act, but reserved for later hearing and argument the question of whether the producers were in fact delivering to Natural the volumes it claimed.

The Commission's decision was appealed by the producers. While this appeal was pending, the producers and Natural agreed upon a settlement of their differences. Under this 1958 settlement agreement, to which Transco was not a party, the producers agreed to withdraw their appeals, the amount of gas to be provided to Natural under its existing contract was fixed, and Natural was given the contractual right to all additional gas which became available for sale in the field, including the right to purchase the gas being sold to Transco when the producers' contracts with Transco expired on April 1, 1971.[2] The settlement agreement expressly recognized, however, that before Natural could succeed to the services then being provided to Transco it would be necessary for the producers to secure abandonment authority from the Federal Power Commission (R. 1434-35).

By Order of August 15, 1958 in *Argo Oil Corporation, et al.*, 20 F.P.C. 208 (1958), the Commission approved the settlement agreement between the producers and Natural as a proper resolution of their differences. The Commission's Order makes clear, however, that its approval was not to "be construed as a waiver of the requirements of Sections 4 or 7 of the Natural Gas Act, or of the Commission's Regulations thereunder, and is without prejudice to any findings or orders which have been or may hereafter be issued by the Commission in any proceeding now pending or hereafter instituted by or against any of the parties to these proceedings" (20 F.P.C. at 220).

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[2] As part of the settlement, Natural also agreed to pay the producers an increase of some 4 cents per Mcf for gas delivered during the period from December 2, 1966 to December 2, 1971.

The present proceedings were instituted by applications filed by the producers in early 1971 to abandon their sales to Transco so that they could sell the gas in issue to Natural. The matter was set for hearing by Commission Order of August 23, 1971 (J.A. 45-54) and hearings held between October 5 and 19 of that year. At the hearings, neither the producers nor Natural, which intervened in support of the abandonment applications, introduced any direct evidence as to the relative needs of the two pipelines for the gas service in issue. However, when New York pointed out at the opening of the hearing that such a comparison appeared to be essential under the standards of Section 7(b) of the Natural Gas Act and the decision in *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 283 F.2d 204 (D.C. Cir., 1960) certiorari denied, 364 U.S. 713, evidence on this question was introduced by the various parties.

On June 2, 1972, the Presiding Examiner issued an Initial Decision holding that the applicants had failed to sustain their statutory burden of showing that the present or future public convenience or necessity permitted the abandonment of the sale to Transco, and proposing therefor to deny the abandonment applications. (J.A. 55-105) He determined that, contrary to the arguments of the applicants and Natural, the Commission's 1958 order in the *Argo* case, *supra* approving the producer-Natural settlement did not, and could not have determined the outcome of the 1971 abandonment proceeding. And, he concluded after detailed anaylsis of the comparative needs of the parties (J.A. 93-101) that:

> "On the basis of all of the evidence of record, the Examiner concludes that Transco and its customers have a continuing need for the 81,000 Mcf/d of La Gloria gas now being sold them by the producers; that Transco's curtailment and possible effect on existing customers is more substantial than the effect

of a decrease in purchases of primarily valley gas by Natural's customers; that Natural has failed to show that the adverse effect on it and its customers permit abandonment by the producers of this sale to Transco; and that the applications seeking to abandon such sales must be denied." (J.A. 101)

The Commission in its Opinion No. 655, issued on March 21, 1973 (Pet. A. 18-30) reversed the Examiner and authorized the abandonment. Stating that the Examiner had improperly focused on the abandonment issue to the exclusion of the producers' applications to provide service to Natural (Pet. A 20), the Commission held that the 1958 contract between the producers and Natural, which it had approved as a settlement of the controversy between those parties, could not be fully effectuated unless it now authorized the abandonment requests (Pet A. 25), and that in the absence of a showing of "unequivocal public necessity" by Transco, it would be contrary to the public interest to abrogate this contract to prolong service to Transco (Pet. A. 26-27). Ignoring the Examiner's findings that Transco had a greater need for the gas than Natural, it concluded that no showing of "unequivocal public necessity" had been made since "both pipelines are in short supply of natural gas and each is rendering less than full service to its customers. The loss of this gas to another pipeline will result in a diminution of its ability to continue even current levels of service" (Pet. A. 27).

The court below unanimously reversed the Commission (Pet. A 1-11). Finding that "at bottom, the Commission's decision stands for the simple proposition that where all parties need contested gas supplies the party having a contractual right to such gas will prevail" (Pet. A. 8), the Court concluded that this formulation "fails to perceive that the fact that all need gas does not mean that all need it equally" (*Ibid.*). Thus, while the Court indicated that the Commission could give "significant

weight" to Natural's contractual rights arising out of the 1958 settlement (Pet. A. 11), it held that under the controlling standards of Section 7(b) of the Natural Gas Act, "primary importance must be given to a broadly conceived comparison of the needs of the two natural gas systems and the public markets they serve" (Pet. A. 10-A11). It also held that the Commission in the remanded proceeding should consider the impact of any abandonment approval upon the environment. (Pet. A. 11).

ARGUMENT

The Court of Appeals correctly decided the question presented by the petitioner, its opinion is not in conflict with any decision of this Court or the other circuits, and the issue presented for this Court's review does not raise questions of importance in the operation of the Natural Gas Act. The petition for a writ of certiorari must, therefore, be summarily denied.

1. The Presiding Examiner who heard the evidence in this case found that the existing pipeline customer Transco had a greater need for the gas than another pipeline, Natural, to whom the producers had agreed to sell the gas upon expiration of their contracts with Transco (J.A. 101). The Commission, without disturbing this finding, held that, particularly since the producers' agreement with Natural had been incorporated into a Commission approved settlement of a dispute between the producers and Natural, it would be contrary to the public interest to deny their abandonment applications filed some thirteen years later unless the pipeline being abandoned, together with its customers or consumer supporters, could demonstrate "an equivocal public necessity" for upsetting the contractual rights of the producers and Natural (Pet. A. 26-27). This showing, it concluded, had not been accomplished because 'both pipelines were in short supply

of natural gas and each is rendering less than full service to its customers." (Pet. A. 27).

The Court of Appeals correctly held that this Commission formulation of its responsibilities under Section 7(b) of the Natural Gas Act, made private contract rather than public interest the touchstone of whether gas service should be abandoned, and effectively shifted the burden of proof from those seeking to abandon established service to those attempting to maintain it. In its view, while "significant weight" could be accorded to the contract rights that resulted from the 1958 Commission approved settlement agreement (Pet. A. 11), "primary importance must be given to a broadly conceived comparison of the needs of the two natural systems and the public markets they serve" (Pet A. 10-11). See *Michigan Consolidated Gas Co.* v. *Federal Power Commission*, 283 F.2d 204 (D.C. Cir., 1960) certiorari denied, 364 U.S. 913. In New York's opinion, this formulation could lead a reluctant Commission to once again ignore the statutory intent of protecting existing service from disruption and to give paramouncy to private contract over the public interest.[3] Specifically, we believe that if, contrary to the petitioner's suggestion here,[4] the Commission were to

[3] There will inevitably be a contract between the seller and a potential buyer of gas before the former seeks to have the Commission approve a shift in service from an existing buyer who wishes to retain the service. The Commission's view, therefore, appears to encourage the very type of "pirating" of gas supplies it states it will not countenance (Pet. A. 27). Apparently contractual theft of gas service becomes "the orderly functioning of the interstate pipeline industry" (*ibid.*), if the agreement therefor is made sufficiently in advance of the date it is to be effectuated.

[4] The Examiner, far from finding that the needs of the two systems were "approximately equal," concluded for reasons he detailed at length (J.A. 93-101) that the effect of the curtailment on Transco's existing customers of any abandonment of the 81,000 Mcf/d of La Gloria gas was "more substantial" than the loss of additional valley gas to Natural's customers, and that Natural had "failed to show" that the adverse effect on it and its customers as

find that the comparative needs of the existing and prospective purchaser of the gas were "approximately equal", the Act contemplates that the existing service should be maintained. But in any event the lower court's conclusion that primary importance must be afforded to a broadly conceived comparison of the needs of the two systems is clearly required by the Natural Gas Act and controlling precedent.

2. The opinion below is not in conflict with this Court's decision in the *Permian Basin Area Rate Cases*, 390 U.S. 747 or *Federal Communications Commission* v. *Allentown Broadcasting Corp.*, 349 U.S. 358. As the Court of Appeals made clear (Pet. A 9, n. 11), the language in this Court's *Permian Basin* opinion from which the Commission derived its "unequivocal public necessity" standard, relates to the completely different issue of the circumstances in which the Commission under the Natural Gas Act may permit a producer or pipeline to abrogate its existing contract with a purchaser to raise its rates above the maximum specified therein. See *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332; *Federal Power Commission* v. *Sierra Pacific Power Co.*, 350 U.S. 348; *United Gas Pipe Line Co.* v. *Memphis Light Gas & Water Division*, 358 U.S. 103. It would be anamolous indeed if these holdings that the Act was intended to protect consumers by superimposing protective rate regulation upon private contracts were to be invoked with respect to the abandonment provisions of Section 7(b) of the Act intended to provide consumer protection against loss of service upon which they have been relying by subordinating private contractual rights "to an obligation, deeply imbedded in the law, to continuous service", *Mich-*

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compared to Transco and its customers permit abandonment (J.A. 101). The Commission did not disturb these findings, since in its view, any comparison was unnecessary where both pipelines were in short supply and rendering less than full service to their customers (Pet. A. 27).

igan Consolidated Gas Co. v. *Federal Power Commission, supra*, 283 F.2d at 214. See also *Sunray Midcontinent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 155-156.

The *Allentown* case is even less apposite. There the Court held that the provisions of Section 310(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 310(b), required that primary attention be given to the equitable allocation of radio stations among the several communities. The FCC could, therefore, conclude that the determinative factor in choosing between mutual exclusive applicants *for new service* was that one would provide a first competing service to its community, without considering which of the two could best serve the needs of their respective communities. The only possible analogy with the Natural Gas Act would be an argument that, where there are two pipelines competing for a *new* supply of gas, the one with the contract for the gas with the producer should be favored, irrespective of their comparative needs for the gas. Even in such circumstances the analogy is far from perfect since the Natural Gas Act does not have any provision analogous to Section 310(b) of the Communications Act providing that contractual provisions are to be prevail in determining whether a particular sale is required by the public convenience and necessity.

3. The factual situation presented by the present case is a "sport" which to the best of our knowledge has not previously arisen during the entire history of regulation under the Natural Gas Act. There has been no general industry practice whereby distributor or pipelines seek to buy away gas under contract to a competitor as of the date the contract expires. The decision below merely reaffirms the basic criteria for considering abandonment applications where the seller's aim is to shift service to a new purchaser, established thirteen years ago in the

Michigan Consolidated case, *supra*, and not subsequently questioned in any Commission proceeding prior to the present one. While affirmance of the Commission's position below could have had a significant impact upon the future operation of the natural gas industry by encouraging canabilism in a period of scarcity, its rejection clearly does not present questions as to the Commission's regulatory authority under the Natural Gas Act calling for the plenary review by this Court.

CONCLUSION

For the reasons set forth above, the opinion below is correct and the petition for a writ of certiorari should be denied.

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